Supreme Court, U.S.
FILED
SEP 20 1994
OFFICE OF THE CLERK

No. 93-1975

IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

ROBERT HADEN KING, JR.,
Petitioner,

v.

NEIL BROWN, SUPERINTENDENT,
CLALLAM BAY CORRECTIONS CENTER,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

REPLY BRIEF OF PETITIONER

ROBERT H. KING, SR.
KING, KING & KING
King Building
757 Chestnut Street
Gadsden, Alabama 35901
(205) 547-2431

REX E. LEE *
CARTER G. PHILLIPS
PAUL E. KALB
NATHAN C. SHEERS
SIDLEY & AUSTIN
1722 Eye Street, N.W.
Washington, DC 20006
(202) 736-8000

Counsel for Petitioner

* Counsel of Record

September 20, 1994

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

BEST AVAILABLE COPY

10 pp

TABLE OF AUTHORITIES

CASES	Page
Dusky v. *United States*, 362 U.S. 402 (1960)	1
Reed v. *Farley*, 114 S. Ct. 2291 (1994)	2
State v. *Conger*, 319 Or. 484, 1994 WL 421381 (Or. 1994)	6
State v. *Gortmaker*, 655 P.2d 575 (Or. Ct. App. 1982), *aff'd*, 668 P.2d 354 (Or. 1983), *cert. denied*, 465 U.S. 1066 (1984)	7
Townsend v. *Sain*, 372 U.S. 293 (1963)	3
STATUTES	
28 U.S.C. § 2254	1, 2
OTHER AUTHORITY	
Rule 8(a) & Advisory Committee Note, Rules Governing Section 2254 Cases in the United States District Courts	5

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

No. 93-1975

ROBERT HADEN KING, JR.,
Petitioner,

v.

NEIL BROWN, SUPERINTENDENT,
CLALLAM BAY CORRECTIONS CENTER,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

REPLY BRIEF OF PETITIONER

In his petition, petitioner Robert Haden King, Jr., demonstrated that (1) the Ninth Circuit's divided holding in the case below that the state court's determination of competency was a finding of fact entitled to the "presumption of correctness" under 28 U.S.C. § 2254(d) is in conflict with the holdings of at least three other courts of appeals and with the principles enunciated by this Court in *Dusky* v. *United States*, 362 U.S. 402 (1960); (2) the Ninth Circuit majority incorrectly applied the burden of proof provided by the "presumption of correctness" to petitioner's habeas claims before he had had the opportunity to present the merits of those claims in an evidentiary hearing before the district court; and (3) the Ninth Circuit's divided holding that a superseding indictment extended the deadline of the Interstate Agreement on Detainers' ("IAD") speedy trial provision

conflicts with the decisions of all courts addressing the issue.

Pursuant to an order of this Court, respondent filed a brief in opposition. The brief is striking primarily for what it does not dispute. Respondent does not contest the fundamental importance to criminal justice of this case, *cf. Amicus Curiae* Brief of the Ga. Criminal Defense Lawyers Ass'n at 3-5 ("[t]he impact of decisions such as the Ninth Circuit's on the criminal justice system cannot be overstated"); nor does he deny that the Ninth Circuit majority has rendered the writ of habeas corpus a total nullity by depriving petitioner of the opportunity to develop and present his claims in a federal forum as provided by 28 U.S.C. § 2254. Respondent further agrees that "any case that presents a valid issue regarding the IAD" would be an appropriate vehicle for this Court to address the question left open in its decision in *Reed* v. *Farley*, 114 S. Ct. 2291 (1994). Opp. 25-26; see Pet. Supp. Mem. Auth. For the reasons set out below, these concessions strongly support this Court's review.

1. Respondent begins by conceding that "[t]here is no question that petitioner suffers from a head injury incurred years earlier in an accident, that the accident evidently has altered petitioner's emotions and judgment, and that he requires medication for seizures." Opp. 4; see Pet. 5. These are the very bases of petitioner's claim that he was incompetent to rescind the plea agreement. Respondent acknowledges that "[p]etitioner's condition deteriorated" during the pendency of his plea agreement with the state, and that this deterioration may have been the result of the "impair[ment]" of petitioner's competence caused by his failure to take medication. Opp. 4; see Pet. 6.[1] Respondent finds himself at a loss to explain

[1] Respondent's selective quotation from a statement made by one of petitioner's attorneys to the state court, Opp. 6 & n.9, must be understood in context. Respondent conspicuously omits the fact that immediately after Mr. Lyons' made the quoted statement, he

the purpose of petitioner's "foolish" behavior in declining to enter a formal plea, a decision that could have had no rational basis. Opp. 6 n.8; *cf.* Pet. 8.

Respondent, unlike the Ninth Circuit majority, concedes that under this Court's decisions competency is a mixed question of law and fact. Opp. 13 ("competency is solely a question of fact *if* the legal standard is not at issue") (emphasis in original); see also *Amici Curiae* Brief of the Ala. Disabilities Advocacy Program and the Southern Poverty Law Ctr. at 5-12 (noting the need for federal courts on habeas review "to preserve the threshold level of competency required to permit criminal prosecution of a defendant" in order to maintain the "moral dignity" of the criminal process and public confidence in convictions). Respondent also agrees that this Court's decision in *Townsend* v. *Sain*, 372 U.S. 293 (1963), would require the district court to hold an evidentiary hearing on petitioner's competency if that claim had been raised, Opp. 16-17, which—as shown below—it was. Respondent understandably offers no defense of the majority's holding below concerning the nature of the competency determination itself or the analysis that confused the burden of proof at a habeas hearing (which was never held) with the standards for holding an evidentiary hearing in the first place.

Because the legal issues presented by the majority's decision below are worthy of this Court's review, respondent blithely attempts to distract this Court with unfounded accusations and by claiming that petitioner did not raise the issue of his competency to withdraw from the plea agreement in the proceedings below. Opp. 9-10. This

---

warned the court that "I'm not qualified obviously to render psychiatric opinions." Exh. 119 at 483-F. The state in turn responded, quite appropriately, that it was "not satisfied with the state of the record" regarding petitioner's competency. *Id.* Accordingly, respondent's attempt to suggest that petitioner was somehow competent to proceed should be rejected.

simply is not the case and respondent's claims are belied by the record.[2] In his habeas petition, petitioner specifically pled, *inter alia,* that "[he] did not knowingly and voluntarily relinquish[] his rights under the Agreement." Opp. App. 5. In addition, petitioner devoted *an entire section* of his memorandum's plea agreement argument to his claim that "[p]etitioner may have been mentally ill at the time that decisions concerning the plea agreement were made." Memorandum of Law in Supp. of Answer to Resp'ts Mot. to Den. Habeas Corpus Relief at 30 ("Pet. Mem.") (section heading). Ironically, the state's own response to petitioner's memorandum had argued *in contra* that "petitioner was competent to rescind his plea agreement." Response to Pet'rs Answer to Mot. to Den. Habeas Corpus Relief at 6. Consequently, respondent is flatly wrong in claiming that petitioner abandoned "the only claim that contained any reference to his mental state," Opp. 10.

Respondent also claims that the federal magistrate below was unaware of and was not presented with any issue with respect to petitioner's competence, *id.*, that the district court in its decision had "fully considered the merits of petitioner's claims," *id.* at 15 n.19, and incredibly that *petitioner* has misled the Court, *id.* at 9. Once again, the record belies respondent's assertions. The magistrate's findings and recommendations adopted by the district court explicitly note that because petitioner's claims had been resolved on other grounds, it was not necessary to determine, *inter alia,* "whether Petitioner was mentally competent when he *first* indicated his desire to withdraw from the plea agreement." Pet. App. 39a n.4 (emphasis in original). In sum, petitioner's plea agreement claims were properly raised before the district court

[2] In the confines of this reply, petitioner can only address some of the many inaccuracies in respondent's brief in opposition. Therefore, petitioner at this time will address only those statements by respondent that relate to the issues presented to this court for review.

and were left unresolved only because the district court reached a wholly indefensible decision concerning its jurisdiction. See Pet. 10.

2. Respondent also contends that petitioner requested an evidentiary hearing "on one issue only," (Opp. 16): whether the state had suffered any prejudice by petitioner's equivocation about the formal entry of his guilty plea. However, petitioner's memorandum listed *several* grounds for an evidentiary hearing and claimed that "the *entire* proceeding [rescinding the plea bargain] denied petitioner due process of law." Pet. Mem. 35 (emphasis added). Only one of these grounds, (3), was based on "the so-called prejudice suffered by the state." *Id.* Petitioner specifically raised the issue that he was mentally ill at the time he was deemed to have rescinded the plea agreement, *id.* at 30, and placed *no* limitation on his request for a hearing: "Because petitioner has successfully rebutted the presumption of correctness of the state court's factual findings, an evidentiary hearing on petitioner's request for habeas corpus relief should be held." *Id.* at 36.

As noted in the petition, a district court on habeas review determines whether an evidentiary hearing is necessary only *after* it has decided whether or not to dismiss the habeas petition. See Rule 8(a) and accompanying Advisory Comm. Note of the Rules Governing Section 2254 Proceedings in the United States Dist. Courts; Pet. 18 n.7. The district court never addressed whether to hold an evidentiary hearing and all parties were informed of the limited scope of the court's decision on the state's motion to deny habeas relief. See United States Dist. Court for the Dist. of Or. Civil Docket for No. 90-CV-315, Entry of Nov. 27, 1991, Record of Phone Conf. ("The ct will consider petitioner's req for an evidentiary hrg, if necessary, after ruling on the pending mot to dsms"). By prematurely reaching the merits of the habeas petition before an evidentiary hearing ever occurred, the Ninth

Circuit majority deprived petitioner of the opportunity to present the claims he had raised before the district court.

3. Finally, respondent can provide no other cases to support the panel majority's view that it was permissible to allow a superseding indictment to extend the strict speedy trial time limits of the IAD. Respondent can only claim that hypertechnical "case-" and "fact-specific" differences between the conflicting cases suffice to distinguish them. "That is, in none of the cases cited by petitioner has a court held, in the circumstances of this case, that a continuance would not be for good cause," Opp. 23. Under respondent's strained interpretation, however, no conflict could ever exist unless the underlying facts were identical. Quite simply, the result reached by the majority below—that respondent was entitled to a "good faith" extension of time solely to secure a new indictment—is inconsistent with the text of the IAD itself and with the decisions of all courts construing that interstate compact. See Pet. 22-23; *Amici Curiae* Brief of the Nat'l Ass'n of Criminal Defense Lawyers, the Ala. Criminal Defense Lawyers Ass'n and the Or. Criminal Defense Lawyers Ass'n at 14-18 ("the Ninth Circuit decision simply cannot be squared with the principles and holdings of the [other] cases").

As before, respondent attempts to divert this Court's attention away from an issue worthy of this Court's review. Instead of focusing on the conflicting IAD decisions, respondent argues that the original indictment was not unconstitutional as held by the state trial court. Opp. 20-21. Respondent argues that petitioner's "allegations [of unconstitutional conduct] ring especially hollow in light of the Oregon Supreme Court's clear holding in *State* v. *Conger*, [319 Or. 484, 1994 WL 421381 (Or. 1994)]." Opp. 21 n.28. However, *Conger*, in which a split Oregon Supreme Court first interpreted the state constitution to permit grand jury deliberations with fewer

than seven members, was not even decided until August 11, 1994. Similarly, all of the cases respondent cites in order to attempt to justify its actions in 1983 were decisions reached long after the original indictment securing petitioner's presence in Oregon was quashed.

The case at issue in the 1983 hearing on petitioner's motion to quash was *State* v. *Gortmaker*, 655 P.2d 575 (Or. Ct. App. 1982) (in banc), later affirmed by the Oregon Supreme Court, 668 P.2d 354 (Or. 1983), *cert. denied*, 465 U.S. 1066 (1984). See, *e.g.*, Exh. 119 at 194. In *Gortmaker*, the Oregon court of appeals found that "[i]f the individual protection—or limitation on the state —provided by [the Oregon Constitution] is to have real meaning, *i.e.*, be enforceable, then an accused must be able to avoid trial on an indictment found by a grand jury selected in violation of the provision." 655 P.2d at 581. The court of appeals exhorted the lower courts to quash unconstitutional indictments before trial. "[W]e are confident that Oregon trial courts, correctly appraised of the law, will exercise diligently their responsibility to quash indictments issued in violation of [the Oregon Constitution]." 655 P.2d at 586. The state of the law in 1983, as specifically stated in the official commentary accompanying Oregon's grand jury statute, was that deliberations with less than seven grand jurors could proceed "only by order of the Court upon good cause shown." Exh. 119 at 197. Respondent, who had unilaterally dismissed a grand juror without good cause, was aware of the official commentary to this legislation, but explained to the court that he had chosen to ignore it. *Id.* at 234. Accordingly, respondent had no "good faith" basis for an extension of time to seek reindictment and this Court should resolve the conflict among the courts below with respect to the speedy trial requirement of the IAD.

* * * *

The issues presented by petitioner are supported by extensive *amicus* participation from a variety of organiza-

tions concerned with the proper functioning of the criminal justice and mental health systems. Respondent makes no effort to dispute the importance of the case as revealed by the petition and the *amicus* briefs. Instead, respondent consistently hides behind unsupported—and unsupportable—claims of waiver to avoid having the issues presented by petitioner reviewed by this Court. The Court need not take petitioner's word that the issues raised in his petition are fairly presented; petitioner, unlike respondent, urges the Court to call for the record below and to examine it for itself. The record demonstrates clearly that the issues presented here were raised below and that only the whipsaw effect of the district court and court of appeals' handling of petitioner's habeas petition prevented his claims from being fully resolved after some form of evidentiary hearing. Once the Court dismisses respondent's unsupported waiver arguments, then the justification for further review by this Court becomes plain.

CONCLUSION

For the foregoing reasons, and those stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

ROBERT H. KING, SR.
KING, KING & KING
King Building
757 Chestnut Street
Gadsden, Alabama 35901
(205) 547-2431

REX E. LEE *
CARTER G. PHILLIPS
PAUL E. KALB
NATHAN C. SHEERS
SIDLEY & AUSTIN
1722 Eye Street, N.W.
Washington, DC 20006
(202) 736-8000

Counsel for Petitioner

September 20, 1994

* Counsel of Record